(2)

94-8988

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ANTHONY LEO STUTSON

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

Supreme Court, U.S.
FILE
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OFFICE OF THE

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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20 pp

RECEIVED

QUESTION PRESENTED

Whether the reasoning and ultimate result reached by this Court in Pioneer Investment Services Co. v. Brunswick Associates ___ U.S. ___, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993) should be adopted and applied in criminal cases.

THE PARTIES

The caption in this case contains the name of all parties.

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PETITION FOR WRIT OF CERTIORARI
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REFERENCE TO OPINIONS DELIVERED BELOW

1. A Petition for Rehearing/Suggestion for Rehearing En Banc was filed and a subsequent denial of consideration issued on January 24, 1995. (See Appendix A).

2. The Eleventh Circuit affirmed the District Court's finding in its opinion of September 9, 1994. (See Appendix B).

3. The April 16, 1993, Order of the District Court ruled that sufficient excusable neglect did not exist. (See Appendix C).

JURISDICTION

On September 9, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed the Order of the United States District Court for the Northern District of Alabama. On January 24, 1995, the United States Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing En Banc.

This Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 13, Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

STATUTORY PROVISIONS INVOLVED

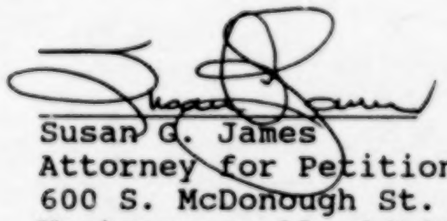
STATEMENT OF THE CASE

Petitioner, Anthony Leo Stutson, was sentenced on July 21, 1992, in the United States District Court for the Northern District of Alabama. He was sentenced to a term of 292 months pursuant to the Sentencing Reform Act of 1984.

Petitioner's counsel mailed, via United States Postal Service, his Notice of Appeal and filing fee on July 30, 1992. This Notice was inadvertently mailed by a staff member to the Eleventh Circuit Court of Appeals in Atlanta rather than the District Court for the Northern District of Alabama. The Notice of Appeal was received by the Eleventh Circuit Court of Appeals on August 3, 1992. This misdirection caused the Notice of Appeal to be filed outside the ten days required by Rule 4 of the Federal Rules of Appellate Procedure.

After receiving the misdirected Notice of

Appeal, the Eleventh Circuit forwarded the Notice of Appeal to the District Court which filed it on August 5, 1992. The Eleventh Circuit notified Counsel on September 16, 1992, of the untimely filing and considered the untimely Notice of Appeal as a motion for extension of time within which to file an appeal and remanded it to the United States District Court for the Northern District of Alabama for a determination of excusable neglect. The District Court found no excusable neglect. The appeal was subsequently dismissed.



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ARGUMENT

The Eleventh Circuit has refused to accept the admission of a careless mistake wherein a Notice of Appeal was misdirected to the Eleventh Circuit Court of Appeals rather than the Northern District of Alabama as sufficient excusable neglect.

Due to this error, the Notice of Appeal was untimely filed on August 5, 1992, in lieu of the filing deadline of July 31, 1992. Counsel mailed the Notice on July 30, 1992. Prior to mailing Counsel contacted the United States Postal Service to insure that the Notice would arrive in Birmingham on July 31, 1992 (the Northern District of Alabama) and, therefore, be filed timely. The Postal Service informed Counsel that it would be delivered and received if mailed by way of First Class postage within one day's time. If

there had been any question about the certainty of receipt and therefore filing by the District Court, Counsel would have mailed the Notice by way of one of the express overnight delivery services.

There was no communication with either the District Court or the Eleventh Circuit until September 16, 1992, when the Clerk for the Eleventh Circuit notified Counsel of the untimeliness of the Notice of Appeal and requested jurisdiction briefs in the matter.

Counsel for Petitioner did everything within Counsel's power to pre-determine the timeliness of receipt/filing of the Notice of Appeal. The District Court held that Counsel should not sit idly by and watch the deadline for appeal approach and then establish excusable neglect by showing untimely delivery of an out-of-town mailing by ordinary mail of the Notice of Appeal the day before the time

for appeal would expire citing Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985).

Federal Rules of Appellate Procedure Three and Four govern notices of appeal. Rule 4(b) gives a ten-day time limit in which to file the Notice of Appeal in criminal cases. Counsel for Petitioner was operating within the proper time frame for timely filing, but for the mistake of the misdirection which remained unknown to Counsel until September 16, 1992, the Notice would have been filed timely. Counsel requested that the Court reconsider the matter and allow out of time filing.

Reliance on the normal course of delivery of mail is reasonable and, therefore, may be the basis for a court to excuse an otherwise untimely filing of a Notice of Appeal. Sanchez v. Board of Regents of Texas Southern University, 625 F. 2d 521 (5th Cir. 1980); see

also Fallen v. United States, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964); In re. Mutual Leasing Corp., 424 F. 2d 999 (Cir. 1970).

Respectfully, considering the proposition that the District Court supposed and cited Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985) and equating this alleged behavior as with inadvertence, mistake or carelessness, the notice must be considered and accepted. In a recent case Pioneer Investment Services Company v. Brunswick Associates, ___ U.S. ___, 113 S. Ct. 1489 (1993), this Court addressed the late filing of a proof of claim in a Chapter 11 Bankruptcy. The District Court denied the motion for the extension of time within which to file. The Sixth Circuit reversed and remanded the decision, and the Supreme Court determined on petition for certiorari, that a late filing would be

accepted where the failure to act is caused by inadvertence, mistake or carelessness, or by intervening circumstances beyond a party's control.

In determining whether an attorney's carelessness is excusable, the Court must take into account four factors; 1) the danger of prejudice to the opposing party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the movant; and 4) whether the movant acted in good faith.

In the case sub judice, analyzing the four factors, there would be no undue prejudice to the opposing party if the appeal were reinstated. Although there has been a delay it has not had sufficient impact on the proceedings because the proceedings had been instituted and all necessary documents

prepared when the notice of the untimely filing was given. Furthermore, the United States Attorney did not object to an extension of time within which to file but deferred to the District Court. (See Appendix D). The mistake and carelessness of counsel's staff member, which counsel ultimately bears responsibility for, which resulted in this outcome, was basically outside counsel's control. The staff member was told to mail it to the District Court. Counsel did not know that it did not, in fact, go to the District Court until later, and counsel acted diligently and in good faith. See also U.S. v. Hooper, 9 F. 3rd 257 (2nd Cir. 1993).

Counsel accepts the responsibility for abiding correctly by procedural rules established by the courts; however, counsel must insist that but for the misdirected notice it would have been timely filed with

the District Court and, therefore, would have been proper. Counsel assures this Court that Counsel's staff is instructed that the Notice of Appeal is always mailed to the District Court. A careless mistake was made. However, counsel feels that good cause has been demonstrated for relief. Denial will result in a substantial hardship to Petitioner particularly in light of his having a 292 month sentence. Further, judicial economy favors resolution of his appeal issues now as opposed to later in a 2255 pleading or an ineffective assistance of counsel claim. Also, nothing in Pioneer, supra, limits the Court's interpretation of "excusable neglect" to Bankruptcy rules.

In Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed 760 (1964), this court established guidelines for determining the outcome in cases such as this. The court

stated that an inquiry should focus on two distinct periods.

> " First, the district court should examine the pre-mailing delay to see if there is something akin to 'excusable neglect' or 'good cause' which excuses the delay. Second, the district court should determine when the document was mailed and whether, in the ordinary course of events, the clerk would have received the [notice] by the applicable filing deadline." (Emphasis added.)

In the instant case, the case was docketed at the District Court on August 5, 1992, five days beyond the ten-day time limit, yet within the thirty-day period allowed for consideration as a motion for extension of time within which to file. Not until September 16, 1992, did counsel discover the untimeliness of the filing after receipt of a letter from the Eleventh Circuit. Timely responses have been made and received since the initial untimely filing.

Other circuits have determined that

excusable neglect existed where the Notice of Appeal was timely mailed but arrived late. See Tarabishi v. McAlester Regional Hospital, 951 F.2d 1558 (10th Cir. 1991); or see United States v. Twomey, 845 F.2d 1132 (1st Cir. 1988), excusable neglect existed where the Notice of Appeal was mailed prior to the deadline for filing but arrived after the deadline when the attorney was only blocks away and could have hand delivered the Notice to the Court; or see United States v. Reyes, 759 F.2d 351 (4th Cir. 1985), where the court and attorney were housed in the same building.

Counsel for Appellant respectfully reminds the Court that the Advisory Committee Comments to F.R.A.P. 3 states that Rules Three and Four should be interpreted in accordance with those cases dispensing with "literal compliance in cases in which it cannot fairly be exacted." Wright v. Deyton, 757 F.2d 1253

(11th Cir. 1985); Halfen v. United States, 324 F.2d 52 (10th Cir. 1963). Sanchez v. Board of Regents of Texas Southern University, 625 F.2d 521 (5th Cir. 1980); and In re Mutual Leasing Corp., 424 F.2d 999 (5th Cir. 1970), excusable neglect existed where a notice mailed to a district court which would have been received by the court in the normal course of time was held sufficient.

CONCLUSION

Petitioner urges the Court to create uniformity of application of excusable neglect by applying the rationale utilized in Pioneer, supra, to criminal cases. The impact of the Circuit Court's affirmance, under the facts of this case, sadly suggests that civil litigants are given far greater deference by the courts than in this case where a criminal defendant is deprived of his liberty for over 24 years.

APPENDIX A

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
JAN 24, 1995

MIGUEL J. CORTEZ
CLERK

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 93-6339

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY LEO STUTSON,
a/k/a "Mookie"

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT, EDMONDSON, & COX, Circuit Judges.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

signed
United States Circuit Judge

ORD-42
(9/91)

APPENDIX B

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
SEP 9, 1994, Miguel J. Cortez, Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 93-6339

D. C. Docket No. 92-00094-CR-H-S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANTHONY LEO STUTSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before HATCHETT, EDMONDSON, and COX, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREFOR, it is now hereby ordered and adjudged by ;this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED.

Entered: September 9, 1994
For the Court: Miguel J. Cortez, Clerk

By: Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 2-14-95

Judgment Entered: July 5, 1991
By the Court: Miguel J. Cortez, Clerk

By: /s/ David Malaud
Deputy Clerk

ISSUED AS MANDATE: OCT 11 1991

APPENDIX C

FILED 93 APR AH 8:17 U.S. DISTRICT COURT N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

VS.) CR92-H-94-S

ANTHONY L. STUTSON A/K/A MOOKIE)

ENTERED APR 16, 1993

ORDER

This matter is before this court under the February 25, 1993 order of remand from the United States Court of Appeals for the Eleventh Circuit for a determination of whether there is excusable neglect for the failure of appellant timely to file his notice of appeal. Following the entry of such remand, the court entered an order on March 3, 1993 directing counsel for defendant to file by March 25, 1993 with the court such verified evidence and legal argument as counsel desired to present in connection with the issue thus

presented. Counsel for the government was given until April 14, 1993 to respond. The matter is now before the court for its findings of fact and conclusions of law.

While the submission by counsel for defendant is not in verified form, the court accepts as true every factual statement therein contained. Based thereon and on the court file, the court makes the following findings and reaches the following conclusions. On July 21, 1992 defendant was sentenced in this court and judgment entered. Defendant's last day for filing a notice of appeal was Friday, July 31, 1992. Counsel for defendant has a significant nationwide appellate practice and is familiar with the rules governing appeals. Counsel is therefore aware of the importance of filing a notice of appeal within ten days of July 21, 1992. On Thursday, July 30, 1992, counsel signed and

mailed from Montgomery a notice of appeal. The notice of appeal was misdirected to the Court of Appeals in Atlanta rather than to the district court in Birmingham. This misdirection occurred as a result of an error by a substitute staff member in counsel's office. The notice of appeal was received on Monday, August 3, 1992 in Atlanta, at which time the appeal was "filed." There is no showing, however, as to why the notice of appeal was not mailed prior to that ninth day. Nor is there any showing that the normal course of mail delivery should have resulted in the notice of appeal arriving in Birmingham on July 31, 1992 with its direction to Atlanta. This court cannot assume that the ordinary course of the regular mail will result in a letter mailed in Montgomery on July 30, 1992 arriving in Birmingham on or in Atlanta July 31, 1992. Neither can counsel

for defendant. Certainly there is no evidence to support such an assumption. Further, there is no showing that counsel utilized upgraded mail service, such as overnight delivery, or inquired on Friday, July 31, 1992 with the clerk's office (in Birmingham or in Atlanta) to determine whether the notice of appeal had been received. An attorney for an appellant cannot sit idly by and watch the deadline for appeal approach and then establish excusable neglect by showing untimely delivery of an out-of-town mailing by ordinary mail of the notice of appeal the day before the time for appeal would expire. Wright v. Deyton, 757 F.2d 1253 (11th Cir. 1985). Counsel for defendant has simply failed to present sufficient evidence or argument to establish excusable neglect under F.R.Cr.P. Rule 4(b). The "motion" of defendant for an extension of time for filing a notice of appeal is

therefore DENIED.

The clerk of court is directed to supplement the record on appeal with a copy of this order, the March 3, 1993 order, the March 25, 1993 motion of defendant with its attachments and a copy of the April 14, 1993 response of the government.

DONE this 16th day of April, 1993.

James H. Hancock
United States District Judge

APPENDIX D

FILED 93 APR 14 PM 2:42 U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 92-H-0094-S
	)	
ANTHONY LEO STUTSON a/k/a "MOOKIE"	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO ESTABLISH EXCUSABLE NEGLECT

Comes now the United States of America, by and through its attorneys, Jack W. Seldon, United States Attorney for the Northern District of Alabama, and responds to defendant's Motion to Establish Excusable Neglect in the above-styled case as follows:

The government defers to the sound discretion of the Court in the resolution of this matter.

Respectfully submitted this 14th day of April 1993.

JACK W. SELDEN
United States Attorney

signed
ROBERT J.MCLEAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same by First Class, United States mail, postage prepaid, this the 14th day of April 1993, to his attorney of record:

Susan G. James
Attorney at Law
600 S. McDonough Street
Montgomery, Alabama 36104

signed

ROBERT J. MCLEAN
Assistant United States Attorney